No petition printed!

DEC 24 1953

HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1953

No. 268 Misc

JESSE DUKES, also known as Sim or Sam Dukes,

Petitioner,

vs.

WILLIAM J. HANNA, Warden, County Jail, Passaic County, New Jersey,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The Governor of the State of Georgia has demanded the return of the petitioner to Georgia as an escaped convict.

Petitioner was arrested under a warrant issued out of the Paterson Municipal Court under N.J.S. 2A:160-21, which provides for arrest before a formal requisition is made by the demanding state.

Thereafter, a formal demand for extradition was made and the petitioner is now in confinement in the Passaic County Jail under our governor's warrant of arrest, dated June 26, 1952, issued pursuant to N.J.S. 2A:160-15.

A habeas corpus proceeding was instituted after arraignment. The demanding papers show five indictments of the petitioner in May, 1940, for larceny of five automobiles on 11 May, 1940, waivers of arraignment and pleas of guilty on all indictments, and sentences on 14 May, 1940 to hard labor for three to five years on each indictment, the sentences to run consecutively. The petitioner escaped from confinement in Georgia on January 23, 1952, and fled to New Jersey.

At the hearing on the application for a writ of habeas corpus, the requisition of the Governor of Georgia to the Governor of New Jersey, exemplified copies of the judgments of conviction of the petitioner and the affidavit of Robert J. Carter, were introduced into evidence and petitioner was identified by an agent of the State of Georgia as the escaped convict referred to therein.

Petitioner testified that he is wholly without funds and does not know any attorney in Georgia. The petitioner proffered testimony in an attempt to show that the petitioner had been deprived of the right to be represented by counsel at his trial and conviction in Georgia. He endeavored to show that his constitutional rights had been violated in the State of Georgia and were likely to be further violated if he were returned.

The petitioner also attempted to introduce evidence to show that he had been subjected to cruel and inhuman treatment by the authorities of Georgia during his confinement; and that he would be unable to resort to the courts of Georgia

in order to protect his constitutional rights or to obtain redress for the wrongs allegedly heretofore committed upon him in Georgia.

The Court below properly excluded all of this proffered testimony on the ground it was not evidential at a hearing for a writ of habeas corpus.

After hearing, the Superior Court ordered that the writ of habeas corpus be discharged. The petitioner thereupon took an appeal of the decision of the Superior Court to the Appellate Division which rendered its opinion on June 15, 1953, wherein it unanimously affirmed the judgment of the lower court.

On September 21, 1953 the Supreme Court of New Jersey denied a petition for certification to that court made by the petitioner.

QUESTION PRESENTED

SHOULD THE COURTS OF AN ASYLUM STATE INQUIRE INTO AND PASS UPON THE QUESTION OF WHETHER OR NOT THE CONSTITUTIONAL RIGHTS OF A FUGITIVE HAVE BEEN OR MAY HEREAFTER BE VIOLATED IN THE DEMANDING STATE.

REASONS FOR DENYING THE WRIT

In this case it is undisputed that the petitioner was convicted of a crime in the State of Georgia; that he is a fugitive from that state and that the extradition requisition and warrants are legally correct.

Furthermore it is well settled that court of an asylum state cannot consider the question of the alleged past or anticipated cruel punishment of a fugitive because consideration fundamental to our federal system requires that the fugitive test any alleged unconstitutionality of treatment he claims he received in the courts of the demanding state. *Sweeney v. Woodall, 334 U.S. 86 (U. S. Sup. Ct. 1952).*

Petitioner's sole argument is the contention that the New Jersey Superior Court should have received testimony in support of his claim that he would not be able to get into the courts of the demanding state (Georgia) to seek relief to which he claims he is entitled, if he is returned to Georgia. Presumably the petitioner takes the position that if the court permitted him to offer such proof the court would be legally justified in barring his rendition.

Petitioner rests his entire legal argument upon the opinion rendered by the United States Supreme Court in *Sweeney v. Woodall, 344 U.S. 86* decided on November 17, 1952 and a concurring opinion rendered by Mr. Justice Frankfurter therein.

In that case, Woodall, a fugitive from an Alabama prison, was arrested in Ohio. He applied to the Court of Common Pleas of Cuyahoga County for a writ of habeas corpus, charging that he had been brutally mistreated in Alabama and would be subjected to such mistreatment if he was returned. He invoked the Eighth and Fourteenth Amendments charging that his past confinement had amounted to cruel and unusual punishment and that any future confinement administered by Alabama would be in violation of rights secured to him under the Federal Constitution. The Court of Common Pleas refused to hear this claim on its merits and denied Woodall's application whereupon he appealed to the Ohio Court of Appeals for the Eighth District and thereafter to the Ohio State Supreme Court, in both cases unsuc-

cessfully. Thereafter he sought to appeal the decision of the Ohio State Supreme Court to the United States Supreme Court but certiorari was denied. *339 U.S. 945.*

Having been unsuccessful Woodall next sought haven in the federal courts and applied for a writ of habeas corpus in the United States District Court for the Northern District of Ohio upon the same grounds asserted in the state courts. The District Court dismissed his petition without hearing evidence whereupon he appealed to the United States Court of Appeals for the Sixth Circuit. The appellate court, without opinion, reversed and remanded the case to the District Court for a hearing on the merits of Woodall's constitutional claims whereupon Sweeney, Sheriff of Cuyahoga County applied to the United States Supreme Court for a writ of certiorari.

The latter court held that the District Court had properly dismissed the application for a writ of habeas corpus on its face and that the Court of Appeals erred in holding that Woodall was entitled to a hearing in the District Court on the merits of his constitutional claim.

The Court stated in its opinion:

> "In the present case, as in the others, a fugitive from justice has asked the federal court in his asylum to pass upon the constitutionality of his incarceration in the demanding state, although the demanding state is not a party before the federal court and although he has made no attempt to raise such a question in the demanding state. The question is whether, under these circumstances, the district court should entertain the fugitive's application on its merits. Respondent makes no showing that relief is unavailable to him in the courts of Alabama. Had he never eluded the custody of his former jailers he certainly would be entitled to no privilege permitting him to attack Alabama's penal process by an action brought outside the territorial confines of Alabama, under the provisions of 28 U.S.C., 2254, and under the doctrine of ex parte, Hawk, supra, he would have been required to exhaust all available remedies in the state courts before making any application to the federal courts sitting in Alabama.

"By resort to a form of 'self-help', respondent has changed his status from that of a prisoner of Alabama to that of a fugitive from Alabama. *But this should not effect the authority of the Alabama courts to determine the validity of his imprisonment in Alabama.* The scheme of interstate rendition, as set forth in both constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama in respondent's asylum to defend against the claimed abuses of its prison system. Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. *Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned.*"

In a concurring opinion Mr. Justice Frankfurter stated as follows:

"I join in the Court's opinion because I agree that due regard for the relation of the States, one to another, in our federal system and for that of the courts of the United States to those of the States requires that claims even as serious as those here urged first be raised in the courts of the demanding State: Even so, it is appropriate to emphasize that in this case there is no suggestion in the application for habeas corpus that the prisoner would be without opportunity to resort to the courts of Alabama for protection of his constitutional rights upon his return to Alabama. We cannot assume unlawful action of the prison officials which would prevent the petitioner from invoking the aid of the local courts nor readily open the door to such a claim. Compare Cochran v. Kansas, 316 U.S. 255. Our federal system presupposes confidence that a demanding State will not exploit the action of an asylum State by indulging in outlawed conduct to a returned fugitive from justice."

The petitioner's contention in the case sub judice is based upon what he terms is the logical inference to be drawn from the language of Mr. Justice Frankfurter's concurring opinion and one sentence contained in the majority opinion which stated:

> "Respondent makes no showing that relief is unavailable in the courts of Alabama."

Petitioner's argument is that such sentence implies that he can offer proof in the asylum state to show that he would be unable to get into the courts of Alabama, the demanding state, to seek the relief to which he claims he is entitled, and that upon presentation of such proof the court in the asylum state can legally refuse rendition.

We respectfully submit that neither the single sentence contained in the majority opinion rendered by the court Sweeney v. Woodall, supra, nor the language contained in the concurring opinion gives rise to the inference or implication which petitioner seeks to draw. In our opinion such language imports that Woodall had not exhausted his legal remedies of appeal to the Alabama courts and the United States Supreme Court before making application for a writ of habeas corpus on constitutional grounds to the federal courts.

The rule laid down concerning writs of habeas corpus in the federal courts specifically established in *Ex Parte Hawk, 321 U.S. 114 (1944) U.S. Sup. Ct.*, and the federal statute *28 U.S.C. Sec. 2254* and followed by later decisions such as *Darr v. Burford 339 U.S. 200 (decided April 3, 1950) U.S. Sup. Ct.* is that a federal court will not entertain an application for habeas corpus until the petitioner has exhausted his remedies in the state courts, viz: *the state courts in which the alleged constitutional violations occurred,* climaxed by an application for a review of the decision rendered by the highest state court by the United States Supreme Court. The rule of exhaustion of remedies applies in such cases unless there is an absence of available State corrective process or there is the existence of circumstances rendering such process ineffective to protect the rights of the petitioner.

A similiar situation is found in the case of *Dye v. John-*

son, 338 U.S. 864 (1949) U.S. Sup. Ct. Johnson, convicted of murder and sentenced to life imprisonment in Georgia, escaped and fled to Pennsylvania where he was arrested as a fugitive. He applied to the federal district court for a writ of habeas corpus claiming that his confinement in the demanding State of Georgia amounted to cruel and unusual punishment in violation of his constitutional rights. The federal district court after a hearing denied the application and appeal was taken to the United States Court of Appeals, Third Circuit. The appellate court reversed the district court, directed the lower court to release the prisoner and held that the doctrine of exhaustion of state remedies did not apply to extradition *(Johnson v. Dye, 175 Fed. Rep. 250, May 17, 1949.)*

The United States Supreme Court, on November 7, 1949 reversed the decision of the Circuit Court of Appeals in a per curiam opinion citing Ex Parte Hawke (supra).

Any question as to petitioner's right to raise in issue at a proceeding in the asylum state the alleged inability of obtaining legal protection in the demanding state has been fully discussed in the decision rendered by the United States Court of Appeals, District of Columbia Circuit, in the case of *Johnson v. Mathews, 182 Fed. 2nd 677 (May 1, 1950),* certiorari denied by the United States Supreme Court, *340 U.S. 828, 95 L. Ed. 608.*

Johnson, a fugitive from Georgia, was arrested in the District of Columbia. He applied to the United States District Court for the District of Columbia for a writ of habeas corpus which the court denied after a hearing, whereupon the issue was appealed to the Court of Appeals. Johnson claimed that his constitutional rights had been violated while confined in Georgia; that he could not get fair treatment in the courts of Georgia, either state or federal, if returned to Georgia. The Court in its opinion said:

(page 679)

"Habeas corpus is the proper process for testing the validity of the arrest and detention by the authorities of the asylum for extradition purposes. But a petition for a writ for that purpose *tests only that detention; it does not test the validity of the original*

or the contemplated incarceration in the demanding state."

(page 679)
"The question before us is whether a court (either state or federal) in the asylum state can hear and determine the constitutional validity of phases of the penal action by the demanding state in respect to the fugitive or his offense. We think that it cannot do so. Authorities, sound theory of government, and the practical aspects of the problem all require that conclusion."

(page 680)
"Both the Constitution and statute (extradition statute) are explicit and mandatory. They require —not merely suggest—that the fugitive, having been secured, be delivered to the demanding state."

(page 680)
"Of course, appellant has a right to test in a federal court the constitutional validity of his treatment by Georgia authorities. But that test cannot come as a part of the constitutional process of returning a fugitive to the state where he is charged. If this fugitive's constitutional rights are being violated in Georgia, *he can and should protect them in Georgia.* Not only state courts but a complete system of federal courts are there."

Concerning a contention by the appellant that the courts of Georgia were non-available for his protection, and his request that he be permitted to present evidence on that non-availability for the court to determine the question *(a situation identical to the issue in the case sub judice.)* the Court said:

"If we will not assume the non-availability of courts in Georgia, we are asked to permit petitioner to present evidence upon that non-availability and then to determine the question. There is an established procedure for the correction of error or dereliction on the part of every court in the country, and where constitutional rights are involved the Supreme Court of the United States stands watchman over every court, state or federal. It would be an act of unwarranted arrogance for us to ascribe to ourselves

> virtue superior to that of other courts and so to assert power to hear and determine the faithfulness to duty of a sister court occupying a place like ours in the federal system."

New Jersey state courts have resolutely followed the principle that the return of fugitives from one state to another is a federal and not a state matter, governed by the Constitution of the United States and the act of Congress passed pursuant thereto. They have held that if the demand for return of a fugitive is made in due form and the requisite documents exhibited, showing that the fugitive is charged with crime, *the duty to surrender becomes merely a ministerial one. In re Cohen, 23 N.J. Super. 209, App. Div. 1952, affirmed 12 N.J. 362, S.C., May 25, 1953.*

In *Powell v. Meyer, 134 N.J.L. 769, S.C. 169 (1946)* the New Jersey Supreme Court held that courts of New Jersey had no right to consider the merits of the fugitive's trial in Georgia nor whether his constitutional rights were violated there.

The New Jersey Court of Errors and Appeals in the case of *In re Colier,* 140 N.J.Eq. 469 (E & A, 1947) said:

> "It is the law that the asylum state of a person fleeing the state of his conviction for crime has no right to consider the merits of his trial, *but only the question as to the obligation of the asylum state to surrender the person to the state from which he fled.* The question of guilt or innocence, or whether there was a violation of petitioner's constitutional right on the trial of the indictments preferred against him in South Carolina, cannot be determined by this court. They are to be determined by the courts of the state in which he was tried, and if denied what he conceives to be his constitutional right, he may apply to the United States Supreme Court for the protection of such right."

See also *Huff v. Ayers, 6 N.J. Super. 380, App. Div. 1950* and *In re Trignani, 13 N.J. Super. 306, App. Div. 1951.*

From a review of the foregoing federal and state decisions it is our sincere opinion that the issue raised by petitioner

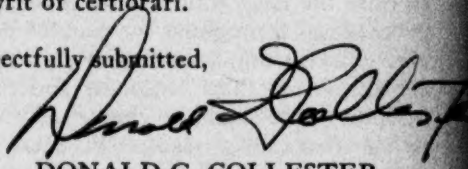
in his application has been well settled and established. No benefit can result from appellate procedure.

It is also readily apparent that if a fugitive is permitted to raise the issue which he seeks to in this matter extradition proceedings throughout the country may well become a mockery. Fleeing convicts and persons accused of crime could defy extradition on false testimony and charges that their constitutional rights would be violated if they were forced to return to the demanding state. To meet such false charges the demanding state would have to become a party to the proceedings in the asylum state which would require untold expense and time to transport witnesses and representatives to asylum states to meet such spurious claims. It would invite fugitives to seek asylum in foreign states to thereby defeat the administration of justice.

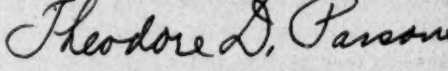
CONCLUSION

For the reasons hereinbefore set forth, the respondent respectfully urges that this Court should deny the application of the petitioner for a writ of certiorari.

Respectfully submitted,



DONALD G. COLLESTER
Passaic County Prosecutor



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